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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/792,190 03/03/2004 Timothy S. Hansen 1410/77059 4927

48940 7590 01/09/2008
FITCH EVEN TABIN & FLANNERY
120 S. LASALLE STREET
SUITE 1600
CHICAGO, IL 60603-3406

EXAMINER

STULII, VERA

ART UNIT	PAPER NUMBER
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1794

MAIL DATE	DELIVERY MODE
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01/09/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/792,190

Applicant(s)

HANSEN ET AL.

Examiner

Vera Stulii

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 29, 2007 has been entered.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-10 and 12 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Kaufmann (US 3,162,536) in view of Bowes et al (Bowes & Church's Food values of Portions Commonly Used).

The rejection and references are incorporated as cited in the previous Office action.

Claims 11 and 13-23 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Kaufmann (US 3,162,536) in view of Bowes et al (Bowes & Church's Food values of Portions Commonly Used) and Flessner GMBH & CO (EP 0084831).

The rejection and references are incorporated as cited in the previous Office action.

Response to Arguments

Applicant's arguments filed October 29, 2007 have been fully considered but they are not persuasive.

On page 8 of the Reply to the Final Office action filed October 29, 2007, Applicants state that (see also pages 9-14 of the Reply):

As discussed in detail below, Applicants believe the Examiner misunderstands the fundamental differences between the form of protein in potato flour and the form of protein in wheat flour, and the effect these different proteins have on the formed product. Due to such fundamental differences, one of ordinary skill would not expect potato flour to provide anything close to a texturally firm pasta (after cooking) without the additional use of texture enhancing agents and, therefore, also not expect potato flour and wheat flour to be simple substitutes for each other.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Further in this regard, as stated in the previous office action Kaufmann discloses:

- a method for producing alimentary food paste from starchy flours of low protein content.
- mixing low protein flours with water (Col. 1 lines 35-36), extruding the pasta dough (Col. 1 line 37).
- the water content of the resulting dough is from 30 to 40 percent by weight (Col. 2 lines 1-3).

- no significant amounts of a texture-enhancing agent.
- The fact that "depending on particular properties of the starchy flours of low protein employed, the *composition of the flour* and the water content of the dough and the processing temperature applied thereto may be adapted to the various needs" (Col. 2 lines 36-41).
- The fact that "the flour may be in a pure form or intermixed with wheat flour ... depending on the properties desired in a finished product" (Col. 2; lines 42-44).

Since Kaufmann discloses producing alimentary food paste from starchy flours of low protein content, and Bowes disclose low protein wheat flours, one of the ordinary skill in the art would have been motivated to modify disclosure of Kaufmann and employ wheat flour having low protein content and also being more traditional ingredient for alimentary paste product. Since both potato and wheat flour are well known and widely used low protein flours, and its selection would have been obvious, as the particular flour would give the product, in this case, pasta, its particular characteristics. One of the ordinary skill in the art would have been motivated to do so in order to obtain a product that has organoleptic properties close to traditional alimentary paste products and having low protein content at the same time.

Regarding applicants arguments about textural firmness (pages 8, 12-13 of Reply), it is noted that although the reference does not specifically disclose every possible quantification or characteristic of its product, including textural firmness, the textural firmness would have been expected to be in the claimed range absent any clear

and convincing evidence and/or arguments to the contrary. The combination of references discloses the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of the ordinary skill in the art would recognize that the textural firmness, among many other characteristics of the referenced product, would have been an inherent result of the product and method disclosed therein. The Patent Office does not possess the facilities to make and test the referenced product, and as reasonable reading of the teachings of the reference has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

On page 9 of the Reply Applicants state that it is unclear why one of ordinary skill in the art would have been motivated to modify both temperature and humidity during the drying process (see also pages 17-18 of the Reply). As stated in the previous Office action, Kaufmann discloses that "depending on particular properties of the starchy flours of low protein employed, the composition of the flour and the water content of the dough and *the processing temperature applied thereto may be adapted to the various needs*" (Col. 2 lines 36-41). Therefore, Kaufmann discloses modifying (adapting) processing (drying) temperature. Since both temperature and humidity are indicators of ambient conditions, and Kaufmann discloses adapting of ambient condition such as temperature, one of ordinary skill in the art would have been motivated to adapt humidity as an ambient condition for the same purposes as temperature as disclosed by Kaufmann.

On page 9 of the Reply Applicants state that the art of record "teaches away by specifically requiring texture enhancing agents". Examiner respectfully disagrees.

Kaufmann does not teach away "by specifically requiring texture enhancing agents", since there is no disclosure in Kaufmann of employing any texture enhancing agents. Kaufmann does not disclose addition of gluten, egg products, humectants, and other texture enhancing agent as specified by applicants on pages 2 and 9 of Specification.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

VS


KEITH D. HENDRICKS
SUPERVISORY PATENT EXAMINER